IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER **W.L. RITTER** **J.F. FELTHAM**

UNITED STATES

v.

Christopher B. DURFEE
Builder Second Class (E-5), U.S. Navy

NMCCA 9901453 Decided 15 September 2005

Sentence adjudged 8 July 1998. Military Judge: K.A. Krantz. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Base, Jacksonville, FL.

LT M.J. NAVARRE, JAGC, USNR, Appellate Defense Counsel
LT J.R. GOODMAN, JAGC, USNR, Appellate Defense Counsel
LT CLARICE JULKA, JAGC, USNR, Appellate Government Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

RITTER, Senior Judge:

The appellant was tried by a general court-martial composed of officer and enlisted members. Contrary to his pleas, the appellant was convicted of forcible sodomy, assault, committing an indecent act, and receipt of obscene materials, in violation of Articles 125, 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925, 928 and 934. The members sentenced the appellant to total forfeitures, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the findings and sentence.

The appellant contends: (1) the charges of forcible sodomy, assault, and committing an indecent act constitute an unreasonable multiplication of charges; (2) the evidence is insufficient to sustain his convictions for forcible sodomy, assault and committing an indecent act against his ex-wife, and for receiving obscene material on his home computer; (3) the members were incorrectly instructed to apply a “local community standard” in determining the obscene nature of material received over the internet; and (4) even if the “local community standard”

was proper, the members in the appellant's case were not qualified to determine that standard for the Miami, Florida, area when appellant's court-martial convened in Jacksonville, Florida.

We have examined the record of trial, the appellant's brief and assignment of errors, his supplemental assignment of error, and the Government's answers to both pleadings. With the exceptions noted below, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Unreasonable Multiplication of Charges

In his first assignment of error the appellant asserts that Specification 1 of Charge III (forcible sodomy), Specification 1 of Charge IV (assault) and Specification 1 of Charge V (indecent act) represent an unreasonable multiplication of charges.[1] At trial the appellant made a motion to dismiss the above-listed specifications as multiplicious, arguing that the assault and indecent act were both lesser included offenses of the forcible sodomy offense. *See* Record at 67-72; Appellate Exhibit XXI. On appeal, the appellant uses the doctrine of unreasonable multiplication of charges in arguing for the same remedy. We agree with the appellant's original contention at trial, and find the assault and indecent acts offenses to be multiplicious with the forcible sodomy offense.

1. Facts

The appellant's marriage with his wife of five months had become strained, and the appellant had begun talking about divorce. One evening, after the appellant had been using his computer, he came into the bedroom of their trailer home, where his wife, S, was lying face down on the bed, in her pajamas. The appellant went into the bathroom, got some kind of cream, and came over to the bed. S noticed he already had an erection.

The appellant straddled S, held her arms behind her back with his left hand, and rested his legs on top of hers. S tried to move, but could not. He pulled her pajamas off and rubbed the cream on her buttocks in the vicinity of her anus. He reached into her anus with two fingers, and S said "Stop, this hurts a lot." The appellant then took his fingers out and penetrated her anus with his penis. After a few minutes the appellant stopped, and S went into the bathroom to clean up. Showing her husband the blood on the towel she used to clean up, S said, "Chris, look at this; look what you did." The appellant replied, " If you

[1] These offenses were originally numbered as Charge VI, Specification 2 (forcible sodomy), the sole specification under Additional Charge I (assault), and Charge VIII, Specification 1 (indecent act). After certain specifications were combined or dismissed on motion, the offenses were renumbered as they appear in Appellate Exhibit LXI.

were relaxed, that wouldn't have happened." Their relationship became more strained from that point on, and S left their home in Florida to return to her parents' home in Puerto Rico six days later.

2. Analysis

Specifications are multiplicious for findings if each alleges the same offense, or if one offense is necessarily included in the other. RULE FOR COURTS-MARTIAL 907(b)(3)(B), MANUAL FOR COURTS-MARTIAL (1998 ed.), Discussion. "A specification may also be multiplicious with another if they describe substantially the same misconduct in two different ways." *Id*.

The elements of the offense of forcible sodomy are: (1) that the accused engage in unnatural carnal copulation with a certain other person; and (2) that the act was done by force and without the consent of the other person. The force element present in the sodomy charge requires both an overt act of force and the victim's lack of consent. Under the facts of this case, the appellant's act of straddling S and holding her arms back while forcibly inserting his penis clearly serves both as the overt act for forcible sodomy and as the basis for the assault charge. *See e.g. United States v. Britton*, 47 M.J. 195 (C.A.A.F. 1997). We have no difficulty concluding that the assault charge is a lesser included offense of the forcible sodomy charge, and is therefore multiplicious for findings.

The multiplicity issue regarding the appellant's conviction for committing an indecent act is less clear. Forcible sodomy and indecent acts are separate crimes, as they each require proof of an element not required to prove the other. *See United States v. Frelix-Vann*, 55 M.J. 329, 331-32 (C.A.A.F. 2001); *United States v. Teters*, 37 M.J. 370, 377 (C.M.A. 1993). In this case, the two charges involve separate acts, in which the appellant employed different parts of his body. Had the facts of this case indicated that one of the appellant's goals in straddling his wife and holding her arms behind her back was to insert his fingers into S' anus, we would have no difficulty in affirming his convictions for both indecent act and forcible sodomy. *See United States v. Neblock*, 45 M.J. 191, 198 (C.A.A.F. 1996)(stating "`[I]f successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.'" (citation omitted)).

However, under the particular facts of this case, we are convinced that the appellant inserted his fingers into S' anus **only** to facilitate the insertion of his penis. S' testimony strongly suggests that the appellant inserted his fingers only long enough for her to react with a brief complaint before he proceeded to insert his penis. Record at 609. Since we are persuaded that the indecent act was only a means to another end -- sodomy -- we find that the appellant's insertion of his two

fingers was part of the force used to commit forcible sodomy. As such, it is a lesser included offense of the latter offense, and must be set aside and dismissed.

Our holding moots the appellant's claim that the three charges and specifications constituted an unreasonable multiplication of charges. *See United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002)(*en banc*), *aff'd*, 58 M.J 183 (C.A.A.F. 2002)(summary disposition). We will take remedial action in our decretal paragraph, below.

Sufficiency of Evidence

Forcible Sodomy

The appellant also challenges his conviction for forcible sodomy on the basis that his wife's testimony was unreliable, thus rendering the evidence factually and legally insufficient. We disagree.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational fact finder could have found that all the necessary elements of the offense beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. However, reasonable doubt does not mean that the evidence must be free of conflict. *United States v. Reed*, 51 M.J. 229, 562 (N.M.Ct.Crim.App. 1997), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). A fact-finder may believe one part of a witness' testimony and disbelieve another. *United States v. Lepresti*, 52 M.J. 644, 648 (N.M.Ct.Crim.App. 1999).

Our task is to determine whether the testimony of the appellant's ex-wife alone was sufficient to convict the appellant. While the appellant's allegations regarding his ex-wife's credibility and possible prior inconsistent statements were developed at trial and ably argued to the court, our own review of the record convinces us that a rational fact-finder could find S' testimony credible. We therefore find the evidence legally sufficient as to the charge of forcible sodomy.

Moreover, we are convinced of the appellant's guilt on this charge beyond a reasonable doubt. S testified in graphic detail concerning the appellant's acts in forcibly sodomizing her. We are convinced from our review of the record that most of the discrepancies in S' testimony are attributable to the fact that she could not speak English. She had difficulty expressing herself at trial even though she testified through an interpreter. She stated she had similar difficulty being

understood during the investigation of the appellant's offenses. Finally, we find her testimony more credible than the only evidence directly rebutting it. That came from Special Agent (SA) Washington of the Naval Criminal Investigative Service (NCIS), who testified that the appellant, in an unsworn oral statement, admitted to massaging his wife with skin cream on the external portion of her anus and to consensual sex on the night in question, but denied committing anal sodomy. We thus find the evidence both legally and factually sufficient to support the finding of guilt for committing forcible sodomy.

Receiving Obscene Materials

The appellant next contends that the evidence is legally and factually insufficient to support his conviction for receiving obscene materials. We disagree.

1. Facts

Shortly after he separated from S, the appellant began living with Ms. B. The difficulties in his relationship with Ms. B served as the basis for a number of charges of which the appellant was acquitted. These included a charge of rape that allegedly occurred on 1 June 1996. On 3 June 1996, at Ms. B's insistence, the appellant moved out of their apartment. When Ms. B returned to her home after a work-related interview, the appellant was still in the process of moving out. At that point, he had removed from the apartment and placed on either a truck or U-Haul trailer almost all of Ms. B's personal property. This property included six or seven computers, most of which Ms. B used for her personal computer business. After arguing with the appellant, Ms. B called the police and, at their direction, the appellant unloaded and returned some of the items, including electronic equipment for which he did not have a receipt. He returned his personal computer, and kept the others.

The next day, 4 June 1996, Ms. B called the NCIS and left a message, seeking their assistance to ensure the appellant left her alone. She then went to a state victim assistance office and applied for a restraining order against the appellant. After returning home, she received a phone call from the appellant, in which he threatened to break her legs if she told anyone what was on his computer. Since the appellant had taken all of the computer monitors, power cords, keyboards, and associated equipment, Ms. B went out and purchased these items so as to examine the computer, in an effort to ascertain the reason for the appellant's threatening phone call.[2] Reviewing the

[2] Ms. B also testified to a secondary motive for examining the computer. She stated that the appellant had threatened to report her to Microsoft Corporation for pirating software. Since the appellant had taken all of her business records when he moved out, she also searched the computer in hopes of finding electronic proof of the purchase certificates for the software she used in her computer business. Record at 762.

computer's files, she found the photographs that were the basis for the charge of receiving obscene matters.

SA Washington met Ms. B at her apartment on 10 June 1996 to discuss her allegations of sexual assault. She took the opportunity to inform him that there were both adult and child pornographic images on the appellant's computer, and suggested he take it. SA Washington told Ms. B that he would not confiscate the computer that day, but would return to take her written statement and would retrieve the computer at that time. He returned and took custody of the computer on 21 June 1996.

2. Analysis

The appellant contends that since Ms. B was a trained computer technician and had sole access to the appellant's computer after he moved out of the apartment, she must have put the obscene material onto his computer. He also suggests that because he was found not guilty of all the other charges that involved Ms. B as a victim, her testimony is inherently unreliable and therefore, we should not affirm any conviction based on Ms. B's testimony. We disagree with both contentions.

The appellant was convicted under Article 134, UCMJ, of violating 18 U.S.C. § 1462. This section of the United States Code prohibits the importation, transportation or receipt of obscene matters. To sustain the appellant's conviction under this section, the Government must establish the following elements beyond a reasonable doubt:

> (1) That during the period 1 January 1994 to 21 June 1996, the appellant knowingly and unlawfully received from the mail or an interactive computer service, several visual depictions;
> (2) That the depictions portrayed defecation, homosexual sodomy and masochism[3]; and
> (3) That the depictions were obscene, lewd and lascivious.

18 U.S.C. § 1462; Record at 1040-41.

After carefully reviewing the record, we have no difficulty concluding that a rational factfinder could find the appellant guilty of this offense. Moreover, we are convinced beyond a reasonable doubt of the appellant's guilt, based on a combination of Ms. B's testimony and other evidence admitted at trial.

In unrebutted testimony, Ms. B stated that she first contacted the NCIS before she even examined the computer. She did so for essentially the same reason that she went to the state victim assistance office immediately after calling NCIS; that is,

[3] The appellant was charged with receiving visual depictions of bestiality as well, but the members found him guilty of the specification after excepting the word "bestiality."

she was seeking help to keep the appellant away from her. Upon her return from the victim assistance office, she received a telephone call from the appellant, threatening to "break her legs" if she told anyone what was on the computer. Only then did she purchase the necessary computer equipment to review the files on the appellant's computer, and discovered the obscene matter.

Other evidence supports the appellant's conviction on this offense. Sergeant Reddish, a friend of the appellant, testified that the appellant had in the past provided him computer disks that contained adult pornographic images. The NCIS computer analysis expert, Ms. Fugere, testified that the obscene photographs that were the basis for the charged offense were contained on the computer's "c" drive, which also included material such as a Seabee emblem, designating the appellant's Naval community, and transcripts of chat room conversations in which he participated. Finally, we are cognizant of the fact that the members viewed the witnesses and, although they acquitted the appellant of numerous offenses relating to Ms. B, they found her testimony credible enough on this point to find him guilty of this offense beyond a reasonable doubt. We are convinced of the appellant's guilt by the same standard, and thus find the evidence both legally and factually sufficient as to this offense.

Standard for Determining Obscenity

The appellant contends that the military judge erred in instructing the members as to the proper standard for determining whether the materials found on the appellant's computer were obscene. Although he agreed at trial that a "local community standard" should be used, he now argues that the proper standard should have reflected the entire internet community. In a separate assignment of error, he contends that even if a local community standard was proper, the court-martial that was convened in Jacksonville, Florida, was not qualified to determine obscenity by the community standard for South Florida. We find that both arguments were waived at trial.

In *Miller v. California*, 413 U.S. 15, 24 (1973), the United States Supreme Court established a three-step analysis for determining whether material may be deemed obscene:

(a) Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(b) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(c) Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The propriety of instructions given by the military judge is reviewed *de novo*. *United States v. Simpson*, 56 M.J. 462, 465 (C.A.A.F. 2002); *United States v. Quintanilla*, 56 M.J. 37, 83 (C.A.A.F. 2001). A failure to object to an instruction prior to commencement of deliberations waives the objection in the absence of plain error. R.C.M. 920(f); *see United States v. Grier*, 53 M.J. 30, 34 (C.A.A.F. 2000); *United States v. Cooper*, 51 M.J. 247, 252 (C.A.A.F. 1999). The burden is on the appellant to establish plain error. *Simpson*, 56 M.J. at 465. In order for there to be plain error, (1) there must be an error; (2) the error must be clear and obvious; and (3) the error must affect the substantial rights of the appellant. *Grier*, 53 M.J. at 34 (*citing United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998)). Military courts are further constrained by Article 59(a), UCMJ, in that they may reverse for legal error only if it "materially prejudices the substantial rights of the accused." *See Powell*, 49 M.J. at 465. The waiver rule of R.C.M. 920(f) reflects a determination by the President that "an attorney may make tactical decisions at trial which, though they may have turned out to be unsuccessful, should not be second-guessed in appellate review." *United States v. Smith*, 50 M.J. 451, 455 (C.A.A.F. 1999).

The appellant, through counsel, **requested** that the members be instructed to use the community standards of South Florida to determine whether the photographs were obscene. While the case law is not firmly settled as to what community standard should be used, we are confident the local community standard used in this case is not inconsistent with the Supreme Court's guidance in *Miller v. California*. In any case, the appellant has not demonstrated that this instruction was in error. Although he now argues for an internet-wide community standard, some military and federal district courts that have considered this issue have rejected an "internet-wide" or "cyber-standard" as a specific community for determining community standards of obscenity. *See United States v. Gallo*, 53 M.J. 556, 568 (A.F.Ct.Crim.App. 2000); *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996). The appellant has failed to demonstrate clear error in the military judge's instruction. We thus find no plain error, and conclude that the issue was waived.

Likewise, the appellant did not argue at trial that the court-martial members were unqualified to apply the South Florida local community standard. Nor has he demonstrated in his pleadings that they were in fact unqualified to implement the standard that he proposed they use. We thus find no clear error. In the absence of plain error, this issue was also waived. *See* R.C.M. 801(g).

Assuming *arguendo* these issues had not been waived and that error occured, we find no prejudice. The appellant has not articulated any prejudice, and having reviewed the photographs ourselves, this court cannot imagine any reasonable community

standard by which they would not be deemed "obscene, lewd or lascivious" by the criteria set forth in *Miller v. California*. Accordingly any error was harmless.

Forfeiture of Pay

As a final matter, although it was not assigned as error, we note that the convening authority erred in approving the adjudged total forfeitures despite the fact that no confinement was adjudged. A service member cannot be required to forfeit more than two-thirds pay while on active duty and not serving confinement. *United States v. Warner*, 25 M.J. 64, 67 (C.M.A. 1987); *see also* R.C.M. 1107(d)(2), Discussion. The appellant has not contended, let alone demonstrated, that he was deprived of more than two-thirds pay for any period of time following his court-martial. However, we will eliminate any potential prejudice in our decretal paragraph.

Conclusion

Accordingly, the court sets aside and dismisses the findings of guilty under Specification 1 of Charge IV and Specification 1 of Charge V. In light of our finding that both of these specifications were multiplicious for findings with Specification 1 of Charge III, we have reassessed the sentence in accordance with *United States v. Cook*, 48 M.J. 434, 437-38 (C.A.A.F. 1998), *United States v. Peoples*, 29 M.J. 426, 427-29 (C.M.A. 1990), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). Upon reassessment, the court finds the sentence, as modified to avoid excessive forfeitures, appropriate for the remaining offenses and this offender.

We therefore affirm the findings only as to Charge III, Specification 1, and Charge V, Specification 7, as approved by the convening authority, and only so much of the sentence as provides for reduction to pay grade E-1, forfeiture of two-thirds pay per month for any period of remaining active service after the date of trial, and a bad-conduct discharge.

Senior Judge CARVER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court